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9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 CHARLOTTE HORNE, WILBERT HORNE,  
JAMES GEHRKE, RUTH GEHRKE,  
12 BARBARA ZOELLNER, and CHARLES T.  
WALTER, JR., Individually and on Behalf of  
13 All Other Similarly Situated Persons,

14 Plaintiffs,

15 vs.

16 ASHBRIIT, INC.; TETRA TECH, INC.;  
RIGHT WAY TREE AND CONSTRUCTION,  
17 dba TATE'S TREE SERVICE AND  
CONSTRUCTION LLC; and Does 1 through  
18 100, inclusive,

19 Defendants.

Case No: 4:18-cv-07181-DMR

**JOINT RESPONSE TO AUGUST 29, 2019  
ORDER RE FEDERAL JURISDICTION**

Date Action Filed: August 23, 2018

## I. INTRODUCTION

Pursuant to the Court’s Civil Law & Motion and Conference Minute Order (“Order”) (ECF No. 61), the parties jointly submit this brief to address the issue of subject matter jurisdiction. Plaintiffs and Defendants Environmental Chemical Corporation (“ECC”) and Tetra Tech, Inc. (“Tetra Tech”, and together with Plaintiffs and ECC, the “Parties”) agree that this Court has supplemental jurisdiction over the state law claims asserted in this case. The Parties likewise respectfully submit that the Court should not decline to exercise supplemental jurisdiction simply because the RICO claim was dismissed. Retaining jurisdiction in *Horne* is particularly appropriate while the court maintains jurisdiction over a related matter entitled *Mason v. AshBritt, et al.*, Northern District of California Case No. 4:19-cv-01062-DMR (“*Mason Action*”), because it advances the interests of economy, convenience, fairness, and comity. *Deluca v. Farmers Ins. Exch.*, 386 F. Supp. 3d 1235, 1268 (N.D. Cal. 2019).

## II. FACTS & PROCEDURAL HISTORY

Plaintiffs filed this case on August 23, 2018 in Napa County Superior Court. ECF No. 1 at 2. The Complaint included five causes of action stemming from allegations related to the United States Army Corp of Engineers (“USACE”) directed cleanup of Plaintiffs’ properties in the wake of the 2017 North Bay wildfires: one under the Racketeering Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961 *et seq.*, and four based upon California law. *Id.* Tetra Tech removed this case, citing this Court’s original jurisdiction: this Court had federal question jurisdiction over the RICO claim and supplemental jurisdiction over the related four state law claims. *Id.* at 3. Plaintiffs have since amended their complaint twice, and in the process dismissed the RICO cause of action.

On February 19, 2019, Plaintiffs’ counsel filed the *Mason Action*, which made substantially similar claims to those alleged here, and included two causes of action under RICO. *See Mason Action*, ECF No. 1. Tetra Tech is a defendant in both the *Mason* and *Horne Actions*. On March 12, 2019, this Court ordered these cases “related” under Civil Local Rule 3-12. ECF No. 35 at 2. Defendants in the *Mason Action* moved to dismiss the RICO claims on July 1, 2019. *Mason Action*, ECF Nos. 41, 42. At the August 29, 2019 hearing on the motions to

dismiss, the Court indicated that its tentative ruling was to grant the motions and dismiss the RICO claims with prejudice. ECF No. 60. However, those motions remain pending.

Following the August 29 hearing, this Court ordered the Parties in the *Horne* Action to submit briefing “addressing whether the court has jurisdiction over this matter and on what basis.” ECF No. 61.

### **III. ARGUMENT**

The *Horne* Action was properly removed to federal court as the Horne Complaint at the time of removal asserted a RICO claim. 28 U.S.C. § 1331. The Court was not divested of jurisdiction when the Horne Complaint was amended to no longer assert any RICO claim. Rather, this Court retained supplemental jurisdiction over the related state claims remaining. Under Section 1367(a), the question is whether the Court will exercise its discretion to *decline* supplemental jurisdiction. Here, the Parties agree that the Court should not exercise its discretion to decline supplemental jurisdiction in the *Horne* Action, particularly because the Court will likely retain jurisdiction over the *Mason* Action: if the Court adopts its tentative ruling to dismiss the RICO claims, the Court retains supplemental jurisdiction over the remaining related state law claims. Moreover, the Parties believe the Court will need to also evaluate the potential applicability of the Class Action Fairness Act (“CAFA”) in the *Mason* Action, which also provides an additional basis for federal jurisdiction, even though Defendants dispute the merits of Plaintiffs’ claims and believe the case is not suitable for class treatment. Consequently, the Parties believe that the Court may and should exercise supplemental jurisdiction in the *Horne* Action because the relevant interests of economy, convenience, fairness, and comity will be advanced by that outcome.

#### **A. This Court Has Discretion to Retain Supplemental Jurisdiction over the Related State Law Claims in This Action Even Though the RICO Claim Was Dismissed**

This Court may adjudicate the state law claims remaining in this case even though Plaintiffs have dismissed their lone federal claim. Congress vested district courts with “original jurisdiction of all civil actions arising under the . . . laws . . . of the United States,” *e.g.*, the

United States Code. 28 U.S.C. § 1331. “[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related . . . that they form part of the same case or controversy.” *Id.* § 1367(a). Claims are part of the “same case or controversy” when they share a “common nucleus of operative fact.” *Kobold v. Good Samaritan Reg’l Med. Ctr.*, 832 F.3d 1024, 1042 (9th Cir. 2016). Although a court may “decline to exercise supplemental jurisdiction” if it “has dismissed all claims over which it has original jurisdiction,” 28 U.S.C. § 1367(c)(3), “[d]ismissal of the federal claims does not deprive a federal court of the power to adjudicate the . . . state claims.” *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 715 (9th Cir. 1990) (citation omitted) (emphasis added).

Plaintiffs’ initial complaint (filed in state court) contained a RICO claim, giving this Court original jurisdiction under Section 1331. That RICO claim “form[s] part of the same case or controversy” as the remaining state law claims, as each claim arises from identical allegations related to the cleanup of Plaintiffs’ properties in the wake of the 2017 wildfires. *See* ECF No. 1. The overlapping allegations thus provided this Court supplemental jurisdiction over the state law claims under Section 1367. Under *Nishimoto* and other Ninth Circuit case law,<sup>1</sup> the Court may thus retain jurisdiction even though Plaintiffs have dismissed their single federal claim.

**B. This Court Should Also Exercise Jurisdiction Here While It Maintains Jurisdiction over the Related *Mason* Action**

In considering whether to retain jurisdiction, this Court should also consider the status of the related *Mason* Action. As noted above, this matter has been deemed related to the *Mason* Action under Northern District Local Rule 3-12. ECF No. 35.<sup>2</sup> The Parties believe that the Court should exercise its discretion and retain jurisdiction while it maintains jurisdiction in the

<sup>1</sup> *See, e.g., Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991) (ongoing exercise of federal jurisdiction proper despite plaintiff dismissing RICO claims following removal).

<sup>2</sup> Local Rule 3-12(a) states, “an action is related to another when: (1) The actions concern substantially the same parties, property, transaction or event; and (2) it appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different judges.”

1 *Mason* Action.

2 **1. The Motions to Dismiss in the *Mason* Action Remain Pending**

3 As a preliminary matter, as of the time of this filing the motions to dismiss remain  
4 pending in *Mason*. The Court indicated that its tentative ruling was to grant the motions, but so  
5 long as they remain pending, there is no question that the Court has jurisdiction over the *Mason*  
6 Action.

7 **2. The Court Will Need to Evaluate Whether CAFA Applies to *Mason***

8 In the event the Court grants the motions to dismiss in the *Mason* Action, the Parties note  
9 that the Court retains supplemental jurisdiction over the *Mason* state law claims which plainly  
10 were related to the RICO claims. As both *Mason* and *Horne* involve claims relating to  
11 Defendants' performance under task orders issued by the USACE, this Court is the appropriate  
12 venue for adjudicating Plaintiffs' state law claims. Consequently, the Court should retain  
13 supplemental jurisdiction. Moreover, it also appears that this Court may have jurisdiction under  
14 CAFA. Should the Court not be inclined to exercise supplemental jurisdiction over the state law  
15 claims in *Mason*, the Court would nonetheless need to consider whether CAFA jurisdiction  
16 exists. CAFA vests the district courts with "original jurisdiction of any civil action in which [1]  
17 the amount in controversy exceeds . . . \$5,000,000 . . . and [2] is a class action in which . . . any  
18 member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C.  
19 § 1332(d)(2). The Parties believe the Court should retain jurisdiction here pending further  
20 briefing on CAFA in the *Mason* Action if necessary.<sup>3</sup>

21 **C. Retaining Jurisdiction over This Case Advances Every Relevant Interest**

22 Adjudicating this case alongside the *Mason* Action furthers the interests of the parties and  
23 of justice. When only state claims over which courts have supplemental jurisdiction remain,  
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25 <sup>3</sup> For example, as to the amount-in-controversy requirement under CAFA, those requirements  
26 are met unless "from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff  
27 cannot recover" the threshold amount. *St. Paul Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S.  
28 283, 288 (1938) (interpreting amount-in-controversy requirement of Section 1332's precursor).  
Later events "which reduce the amount recoverable below the statutory limit do not oust  
jurisdiction." *Id.* at 288–89. Thus, it is irrelevant to the jurisdictional issue that Defendants have  
pending motions to strike the class allegations.

“courts consider the four factors of economy, convenience, fairness, and comity when deciding” to retain jurisdiction. *Deluca*, 386 F. Supp. 3d at 1268. When there is “significant overlap” between state claims and claims over which a court must exercise jurisdiction, each factor encourages retaining jurisdiction over the state claims. *Id.* at 1268–69. The Parties believe that is true here.

As to economy and convenience, this case is “related” to the *Mason* Action under Civil Local Rule 3-12. ECF No. 35 at 2. As such, “[i]t appears likely that there will be an unduly burdensome duplication of labor and expense” if it and the *Mason* Action “are conducted before different judges.” Civ. Local R. 3-12(a)(2). The coordination of briefing and proceedings between the cases thus far confirms that keeping them before this Court will streamline the resolution of each. Likewise, the cases “concern substantially the same parties, property, transaction or event,” Civ. Local R. 3-12(a)(1): Tetra Tech is a defendant in both cases, the cases share Plaintiffs’ counsel, and each case brings overlapping causes of action related to cleanup in the wake of the 2017 wildfires under the auspices of the USACE.

As to fairness, the relationship between this case and the *Mason* Action likewise entails an undue risk of “conflicting results” if the cases are adjudicated separately, Civ. Local R. 3-12(a)(2), in state and federal courts with distinct procedural rules. This risk is particularly unfair to Tetra Tech: as a defendant common to both cases, it faces the prospect of conflicting rulings on liability for its conduct in the same cleanup project. *See Blackwell v. SkyWest Airlines, Inc.*, 245 F.R.D. 453, 465 (S.D. Cal. 2007) (inconsistent judgments are inherently unfair).

And as to comity, “there is no special state law expertise needed to adjudicate” the remaining state claims, *Deluca*, 386 F. Supp. 3d at 1269, which are common-law property torts and California’s amply interpreted Unfair Competition Law.

Finally, Defendants in both cases anticipate asserting the federal common-law defense/derivative sovereign immunity argument that “government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States.” *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943); *see Yearsley v. W.A.*

1 *Ross Constr. Co.*, 309 U.S. 18 (1940). The presence of this defense confirms the appropriateness  
2 of federal jurisdiction.

3 **IV. CONCLUSION**

4 This Court should continue to exercise jurisdiction over this case under Section 1367.

5  
6 Dated: September 11, 2019

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